

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #05-233

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On September 13, 2006, the Water Pollution Control Board conducted the first public hearing/board meeting concerning the establishment of two voluntary performance based leadership programs, the Environmental Stewardship Program (ESP) and the Comprehensive Local Environmental Action Network (CLEAN), that are new Indiana programs offering recognition and incentives for companies and units of local government that consistently demonstrate environmental stewardship and strive for continual environmental improvement in Indiana's environmental programs. Comments were made by the following parties:

Janet McCabe, Executive Director of Improving Kids' Environment (IKE)

Glenn Pratt, citizen (GP)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Participants in these programs must be encouraged to see environmental compliance as the basic starting point and to go far beyond that point. In order for IDEM to encourage that kind of activity, it is critical that these programs have the utmost credibility so that companies want to join. Program credibility requirements include IDEM having adequate resources to oversee the program. IDEM has indicated that a goal of the program is to shift some resources away from compliance activities to assistance for program applicants and participants. It will be difficult to anticipate resource needs when the number of applicants is unknown, but IDEM must be ready to put the necessary resources into every aspect affecting the program. (IKE)

Response: The IDEM statement made was that resources are anticipated to be allocated in a different manner as a result of this program. IDEM desires to allocate resources toward Indiana's environmental challenges and sources IDEM rarely inspected. Other states with similar programs have increased overall agency efficiency as a result of these programs. IDEM's program has been designed to maximize agency efficiency and provide real business value to members. In regard to IDEM's resources to administer the program, the Office of Pollution Prevention and Technical Assistance (OPPTA) has prepared accordingly, providing training to many OPPTA employees should the need arise to involve other OPPTA staff.

Comment: Another element of program accountability is for IDEM to provide a very detailed annual report that specifies the entities that are program members, what they have done, and what progress they have accomplished. In other discussion venues, IDEM has committed to producing the annual report though the rule language does not include the report as a requirement. However, IDEM has not indicated it will include in the annual report the compliance issues that program members have had in the previous year. IDEM believes the availability of compliance information in other forms in agency information suffices rather than including it in an annual report on the ESP/CLEAN programs. In the interest of efficiently putting compliance information into the hands of people who are interested in knowing how the ESP/CLEAN program is working, compliance information about ESP/CLEAN members also needs to be included in the annual report. It would not be a tremendous burden on IDEM to include the compliance information in the annual report. (IKE)

Response: IDEM's Office of Pollution Prevention and Technical Assistance is already required by statute (IC 13-27-6-1) to produce an annual report that includes all activities,

including ESP. Based on this and similar comments, IDEM has agreed to provide a link to compliance information for regulated entities on the ESP Web site, directly linking each member to its most up-to-date compliance history. Concerned citizens have expressed a desire to keep all information updated and readily accessible. This Web site will provide much more recent data than an annual report that takes months to complete and publish. The report will also include the name of any member that has been removed from the program.

Comment: Another element of the program credibility rests on the incentives offered to program members. Preferential treatment to companies that are doing an excellent job is not unwarranted, but what those preferences are makes a difference. Particularly at issue regarding program credibility is the preferential treatment of advance announcement of compliance inspections by IDEM. A really excellent company should want the world to know that it is ready to be inspected at any time. Advance announcement of compliance inspection will not enhance program credibility. (IKE)

Response: It is IDEM's intent to ensure inspections of ESP facilities are credible and thorough. Proper representation from the inspected facility is essential in order to conduct a thorough inspection. More and more facilities have one environmental manager overseeing numerous facilities. These facilities, if ESP or CLEAN members, and their environmental managers have earned a mere 24-hour notice to ensure they are present or have arranged for proper representation at the facility. Currently, in an effort to ensure proper representation and inspection criteria, there are several inspection scenarios outside of ESP where advance announcement of the inspection is provided.

Comment: If the incentive of streamlining paperwork for members of the ESP and CLEAN programs is a good idea, then paperwork streamlining should be a good idea for all entities that IDEM regulates. (IKE)

Response: In several cases, this will take place in the near future. Many of these regulatory incentives are being piloted through ESP to determine their benefits and effects on programs and members. ESP will provide efficiency improvements for both the agency and members of the program. As some incentives become the rule for all regulated entities, IDEM will be challenged to identify and develop additional incentives to continue to encourage facilities to "go beyond compliance" producing positive environmental results.

Comment: Program credibility also relies on who can become a member. The rule does lay out certain factors that would immediately make a company ineligible and other factors that might make a company ineligible. In the current rule version, a company might be ineligible for membership due to current noncompliance with an order or a decree. A company that is in current noncompliance with an order or a decree issued by IDEM or the U.S. EPA really should be required to resolve that noncompliance before being eligible for inclusion in the program. (IKE)

Response: This provision was recently discussed again in an effort to better understand the concern and consider this comment. It was determined that far too many insignificant conditions not related to environmental performance are included in Agreed Orders and Consent Decrees. Because of this, IDEM must be able to use discretion to assess these potential member cases individually. However, this provision still provides IDEM with the ability to deny or revoke membership in these cases and will be used as intended to ensure and maintain a high standard of program credibility.

Comment: IDEM needs to make sure that EPA is comfortable with every element of this rule including the incentives regarding reduced frequency of monitoring. (IKE)

Response: EPA is encouraged by the fact that Indiana is developing such a program and

eager to assist in the implementation of ESP. Conceptually, EPA agrees to this condition. The actual language to be used in a written agreement between IDEM and EPA remains under development.

Comment: Most everything being proposed by the ESP and CLEAN programs is already available for the state to do in dealing with dischargers. IDEM currently has the discretionary ability to make management decisions about where to focus more or less attention. Dischargers with problems should receive more of IDEM's attention than dischargers that are in complete compliance. If there are ways to make the permit system better, then why only make it better for the entities that probably need the least help? The permit process should be improved and the whole system streamlined to make it better for all permittees. This rule only creates another bureaucracy. (GP)

Response: One of the primary goals of IDEM's current administration is to be clear and consistent in making decisions and regulating sources. Basing a program such as ESP on agency discretion cannot provide the desired level of consistency and fairness to the public or members. Some environmental groups have expressed concern with the potential for members to negotiate incentives with the agency on a case by case basis using agency discretion. Putting this program in rule greatly reduces the potential for such activity. Other states with similar programs have increased overall agency efficiency as a result of these programs. IDEM's program has been designed to maximize agency efficiency and provide real business value to members. In several cases, incentives are being used to pilot new, more efficient methods of regulating sources. In the future, it is planned to offer similar efficiency opportunities to all regulated sources in Indiana. ESP will provide efficiency improvements for both the agency and members of the program. As some incentives become the rule for all regulated entities, IDEM will be challenged to identify and develop additional incentives to continue to encourage facilities to "go beyond compliance" producing positive environmental results.

Comment: There is common knowledge about some facilities that somehow they found out when IDEM was coming to do an inspection and gravel was applied to hide evidence of spills. There is a major petroleum refiner in the nation that is under investigation for falsifying data at its Alaska facilities. That company in Indiana may have good performance, but do we really want a company like that with a bad national record being considered for this program? The rule does not address situations concerning the corporation's national reputation. (GP)

Response: It is common to find different, autonomous management groups in place in facilities owned by a large corporation. It is not IDEM's intent to discourage top-performing Indiana entities from doing good things for the environment and producing positive environmental results here in Indiana because a facility under common ownership in Alaska has compliance issues.

Comment: Consultants are going to love this program because they will make lots of money doing the applications for companies wanting to become members. Small facilities that cannot afford consultant's fees are at an economic disadvantage. IDEM should be working more to help the small facilities.

Response: ESP specifically was designed to be different from U.S. EPA's National Environmental Performance Track program to allow membership by small and medium sized facilities and provide value to such sources. IDEM has spent much time and effort to address these concerns. IDEM will be providing assistance to facilities to develop environmental management systems (EMS) and provide EMS verification audits at facilities free of charge. The application for the program is non-technical in nature and shouldn't require consultant services; however, assistance from OPPTA is available if needed.

Comment: IDEM's current conduct of giving a second opinion to a discharger's plans is not a problem except for the aspect of then providing that discharger freedom from enforcement if that opinion doesn't work out for the discharger. The state should not be in the consulting business but should be giving small facilities help to keep them from being at an economic disadvantage with the large, well-monied facilities. (GP)

Response: IDEM assistance is offered freely, but no entity is required to follow that advice. IDEM enforcement action is taken where sufficient, repetitive, or significant violations of environmental regulations occur.

Comment: This rule, through the incentive of reducing frequency of reporting, takes away the citizens' rights to know what dischargers are putting into our waters of the state. Once per year discharge monitoring report submissions is totally unacceptable.(GP)

Response: This proposed incentive does not impair the public's ability to learn of facility discharges that exceed permit levels. The annual reporting requirement is what the federal rule allows, and several other states already utilize this annual reporting mechanism. For those facilities that do not exceed their discharge parameters, these reports are merely affirmative compliance reports. The public has access to each facility's discharge parameters. The facility's permit has separate conditions for reporting any exceedance, usually within 24 hours of determination, which is also public record.

Comment: IDEM's staff should be working on critical and emergent environmental issues rather than spending time on bureaucratic and unnecessary programs giving benefits that aren't justified while making the process easier for a select group rather than for every discharger. Rather than creating another paperwork program, IDEM should be putting its efforts into solving the problems the state is not presently addressing and seeking grant and federal funding that Indiana has been letting other states receive at our disadvantage. (GP)

Response: ESP has been modeled after the U.S. EPA's National Environmental Performance Track Program and other state environmental performance leadership programs. These programs have produced improvements to local and regional environmental issues that could not have been attained through traditional regulatory programs. These programs form partnerships with proactive regulated entities that, through these partnerships, are not only willing to discuss local and regional environmental challenges but also assist other entities in that area that may lack the environmental resources to understand the issue and work toward a solution. ESP will provide efficiency improvements for both the agency and members of the program. States with similar programs have increased overall agency efficiency as a result of these programs. IDEM's program has been designed to maximize agency efficiency and provide real business value to members. In addition to several other grants OPPTA was recently awarded by EPA, OPPTA has already been awarded a grant from EPA for the Environmental Stewardship Program.